No. 75-624

In the Supreme Court of the United States

OCTOBER TERM, 1975

EVAN E. JONES, JR., ET AL., APPELLANTS

v.

T---- H----, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This submission is made in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

QUESTION PRESENTED

The United States will discuss the following question:

Whether state welfare regulations that require minors eligible for assistance under the state's programs of Aid to Families with Dependent Children ("AFDC") and Medical Assistance ("medicaid") to obtain parental consent before they may receive family planning services are in conflict with Titles IV and XIX of the Social Security Act, 42 U.S.C. 601 *et seq.*, and 1396 *et seq.*[1]

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[1]Since, in our view, such welfare regulations are not permitted by the Social Security Act, we do not discuss whether they violate the Fourteenth Amendment. Nor do we discuss the question whether a guardian *ad litem* should have been appointed to represent the named appellee.

STATEMENT

1. Titles IV and XIX of the Social Security Act, 49 Stat. 627 and 79 Stat. 343, as amended, 42 U.S.C. 601 *et seq.* and 1396 *et seq.*, establish cooperative federal-state programs of financial and medical assistance to needy families with dependent children and to the aged, blind, and disabled. States that elect to institute these programs must satisfy the requirements of Sections 402(a) and 1902(a) of the Act, 42 U.S.C. 602(a) and 1396a. See, *e.g.*, *Van Lare* v. *Hurley*, 421 U.S. 338, 340.

With respect to the AFDC program, Section 402(a) (42 U.S.C. (Supp. IV) 602(a)) provides:

> A State plan for aid and services to needy families with children must
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> * * * * *
>
> (15) provide as part of the program of the State for the provision of services under [Title] XX * * * for the development of a program, for each appropriate relative and dependent child receiving aid under the plan * * * for preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life, and for implementing such program by assuring that in all appropriate cases (including minors who can be considered to be sexually active) family planning services are offered to them, and are provided promptly * * * to all individuals voluntarily requesting such services * * *.[2]

[2]Section 402(a)(15) was amended effective July 1, 1975, to require participating states to offer family planning services through Title XX of the Act, 88 Stat. 2337, 42 U.S.C. (Supp. IV) 1397 *et seq.*, rather than as a part of their AFDC plans as such, which was the case under the statute construed by the district court (see J.S. App. 16). The substantive standards with which participating states must comply, however, were not changed by the amendment.

Similarly, with respect to the medicaid program, Section 1902(a)(13)(B) provides that a state plan for medical assistance must offer the categorically needy "at least the care and services listed in clauses (1) through (5) of section 1396d(a) of this title * * *," which services include "family planning services and supplies furnished * * * to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies * * *." 42 U.S.C. (Supp. IV) 1396d(a)(4)(C).

2. The State of Utah is a participant in AFDC and medicaid programs funded under the Social Security Act. To fulfill its statutory obligations, the State has contracted with the Utah Planned Parenthood Association ("UPPA") to provide family planning services and supplies to eligible AFDC and medicaid recipients. By regulation, however, the State has stipulated that UPPA may furnish such services to a minor only upon the written consent of the minor's parents (J.S. App. 12-13, 54).

3. Appellee T---- H---- is a minor whose family was receiving aid under the Utah AFDC and medicaid plans. She sought family planning information, counseling, services, and supplies from UPPA, which denied assistance because of her refusal to obtain parental consent (J.S. App. 13). She then instituted this class action in the United States District Court for the District of Utah, challenging the requirement of parental consent as in conflict with Titles IV and XIX of the Social Security Act, various regulations of the Department of Health, Education, and Welfare, and her constitutionally protected right to privacy.

A three-judge district court, convened pursuant to 28 U.S.C. 2281, enjoined enforcement of the state's reg-

ulations on both statutory and constitutional grounds (J.S. App. 48-50). The court, with one judge dissenting, held that "[t]he state's regulations impermissibly engraft upon the federal scheme a condition for eligibility where Congress has undertaken fully to define the class of persons who may receive family planning assistance" (J.S. App. 19) and that "the state may not enforce the choice of parents in conflict with a minor's constitutional right of free access to birth control information and services" (J.S. App. 28).

DISCUSSION

1. In our view, Utah's welfare regulation requiring parental consent as a prerequisite to an eligible minor's receipt of family planning services under the State's AFDC or medicaid program is incompatible with the Social Security Act. Our analysis, however, differs somewhat from that of the appellees and the district court.

Relying on *King* v. *Smith*, 392 U.S. 309, *Townsend* v. *Swank*, 404 U.S. 282, and *Carleson* v. *Remillard*, 406 U.S. 598, the district court reasoned that the Utah regulations impermissibly impose a nonfederal condition on eligibility for AFDC and medicaid assistance. Each of those cases, however, concerned threshold eligibility for participation in a federally-funded assistance program, rather than, as here, the basis on which particular services are to be made available to eligible recipients. It is undisputed that appellee T---- H---- was eligible to receive assistance under the state AFDC and medicaid plans. The question before the district court therefore did not relate to eligibility as such; rather, the question was whether the state could, by welfare regulation, withhold particular services from an eligible minor who had not obtained parental consent.

This distinction is crucial. Although, as the above decisions hold, the eligibility provisions of the Act are

mandatory, the states generally retain substantial discretion over the extent to which various services will be provided to eligible individuals. See, *e.g.*, *Jefferson* v. *Hackney*, 406 U.S. 535, 541; *Dandridge* v. *Williams*, 397 U.S. 471, 478. Thus, we believe that the rationale of the district court is unnecessarily broad and could, if applied indiscriminately in other contexts, improperly infringe upon the states' discretion to determine the appropriate scope or levels of benefits.

We nevertheless agree with the district court that the regulation challenged here is inconsistent with the Social Security Act. The Act directs that a state AFDC program must assure "that in all appropriate cases (including minors who can be considered to be sexually active) family planning services * * * are provided promptly * * * to all individuals voluntarily requesting such services." Section 402(a)(15) of the Act, 42 U.S.C. (Supp. IV) 602(a)(15). The Act similarly requires that state medicaid programs must cover "family planning services and supplies furnished * * * to individuals of child-bearing age (including minors who can be considered to be sexually active) * * * who desire such services and supplies * * *." Section 1905(a)(4)(C) of the Act, 42 U.S.C. (Supp. IV) 1396d(a)(4)(C). In our view, these provisions indicate a congressional intent to preclude a participating state's discretion to promulgate welfare regulations that deny family planning services to otherwise eligible minors who have not obtained parental consent.[3]

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[3]This is not necessarily to say, however, that in administering their AFDC and medicaid programs the states may not enforce legislative enactments of general applicability that require parental consent for receipt of family planning services by minors. If a state determines that it is generally inappropriate for minors, whether or not the recipients of welfare assistance, to receive family planning services without parental consent, it could be argued that a minor who has not obtained such consent does not present an "appropriate case" for the receipt of such services within the meaning of Section 402(a)(15) of the Act. See also Section 1902(a)(17), permitting the states to establish "reasonable standards * * * for determining * * * the extent of medical assistance" under their medicaid plans. We express no view on that question, which is not presented here.

The statute specifically requires that participating states provide family planning services to *all* eligible individuals, explicitly including sexually active minors, who request such services. Nothing in the statute suggests a legislative purpose of permitting the states to place special restrictions on the availability of such services. Moreover, the legislative history refers to the states' obligation to furnish family planning services to all eligible sexually active recipients as "mandatory." S. Rep. No. 92-1230, 92d Cong., 2d Sess. 297 (1972).

Thus, Congress did not grant the states discretion to place conditions, by special welfare rule, on the availability of family planning services to minors. Accordingly, the Secretary's regulations correctly provide that "[f]amily planning services must be offered and provided to those individuals wishing such services * * * without regard to marital status, age, or parenthood." 45 C.F.R. 220.21.[4]

There is no room in this scheme for a special requirement of parental consent. To the contrary, by requiring the furnishing of services to individuals, rather than to families, the Act evinces a congressional intention that the services be furnished to the individual at his or her own request, without regard to the possibly conflicting desires of a parent or spouse. Moreover, the Senate Finance Committee emphasized that "particular effort is [to be] made in the provision of family planning services to minors * * * who have never had children but who can be considered to be sexually active." S. Rep. No. 92-1230, *supra*, at 297.

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[4]See also 45 C.F.R. 220.20. While these regulations are not applicable to Title XX, which now governs the grant of family planning services to AFDC recipients, they are probative of the proper interpretation of Section 402(a)(15), which imposes the family planning services requirement on participating states.

The imposition of a requirement of parental consent detracts from, rather than furthers, that congressionally mandated effort. Accordingly, the district court correctly held that the Utah regulations here in question conflict with the Social Security Act.[5]

2. The question is important to the administration of Titles IV and XIX of the Social Security Act. The Secretary must approve any state plan that meets the requirements of those Titles and is required to disapprove any plan that fails to satisfy those requirements. 42 U.S.C. 602(b) and 1396 a(b). Furthermore, the Secretary is responsible for enforcing compliance with the mandatory terms of the Act and may terminate federal funding to any state that is found, after opportunity for hearing, to be in substantial violation of any provision. 42 U.S.C. 604 and 1396c.

The Secretary has now determined that six states, including Utah,[6] have welfare plans that require a minor to obtain parental consent as a condition of receiving family planning services under the medicaid program. The right of those states to continue to enforce

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[5]Appellants rely (J.S. 9) upon the approval of Utah's AFDC and medicaid plans by the Regional Office of the Department of Health, Education, and Welfare. This reliance is misplaced. The State's parental consent requirements were not contained in its medicaid plan as approved. Although the State's AFDC plan imposed a requirement of parental consent, approval was based upon an erroneous understanding that the requirement reflected state law on the competence of minors generally to receive family planning services and was not simply a special limitation on the provision of such services to welfare recipients (see p. 5, n. 3, *supra*). In fact, it appears that Utah does not generally condition a minor's ability to receive non-welfare family planning services upon parental consent (J.S. App. 22, n. 4).

[6]The other five states are Alabama, Colorado, Georgia, Hawaii, and South Dakota.

those requirements will be affected by the decision in this case.[7]

In view of the number of states whose interests will be affected by the decision in this case, plenary review appears warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

ROBERT H. BORK,
Solicitor General.

ST. JOHN BARRETT,
Acting General Counsel,
Department of Health, Education,
and Welfare.

APRIL 1976.

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[7] In addition, the Secretary has determined that five other states—Florida, Nevada, North Dakota, South Carolina, and Texas—have statutes of general applicability that have been construed as requiring minors to obtain parental consent before receiving family planning services. The right of those states to continue to enforce those statutes with regard to AFDC and medicaid beneficiaries may be affected by the decision in this case. But see p. 5, n. 3, *supra*.